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Supreme Court, U.S.
FILED
NOV 24 2000
CLERK

No. 99-1408

In The

Supreme Court of the United States

GAIL ATWATER, AND MICHAEL HAAS AS NEXT FRIEND OF ANYA SAVANNAH HAAS AND MACKINLEY XAVIER HAAS,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK, AND FRANK MILLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT IN REPLY

The custodial arrest of Gail Atwater was unreasonable.[1] Petitioners have demonstrated why the arrest was constitutionally unreasonable and violated the Fourth Amendment: first, the arrest would have been unlawful when the Fourth Amendment was adopted; and second, the nature and degree of the intrusion that accompanied the custodial arrest far outweighed any governmental interest in enforcement furthered by the arrest.

Respondents and their *amici*, in turn, raise two primary arguments to defend the decision of the court below. First, they dispute the meaning of the term "breach of the peace," then contend that regardless of its meaning, legislatures may freely reduce the protections against arrest that existed when the Fourth Amendment was adopted. Second, they urge that probable cause alone determines the reasonableness of all custodial arrests, and the nature of the offense for which the arrest was made should be ignored.

These arguments fail to demonstrate the arrest here was any more reasonable in a constitutional sense than it was from a common-sense perspective. The authorities respondents and their *amici* cite fail to indicate such an arrest would have been lawful when the Fourth Amendment was adopted, and no decision of this Court indicates that framing-era protections can or should be abandoned. Respondents and their *amici* likewise fail to demonstrate probable cause is an adequate substitute in this case for the Fourth Amendment's reasonableness standard. Finally, they offer no convincing support that the custodial arrest of Ms. Atwater remotely furthered any legitimate law enforcement interest sufficient to justify the intrusion.

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[1] Even some of respondents' *amici* essentially concede that Officer Turek should not have arrested Ms. Atwater. *See* U.S. Br. at 7; Texas Br. at 10.

I. The Framing Era's Protections Against Arrest Should Not be Forgotten or Ignored

Respondents and their *amici* contend the term "breach of the peace" encompassed all crimes, then assert that framing-era restrictions on custodial arrest are just not important. The argument that "breach of the peace" had so broad a definition as to render the common law rule a non-rule is not persuasive. Further, this Court has never indicated the Fourth Amendment protects Americans today less fully than their framing-era forebearers. Constitutional protections do not erode with time.

A. An Arrest Like the One at Issue Here Would Not Have Been Permitted When the Fourth Amendment Was Adopted

Respondents and their *amici* do not expressly argue that an arrest of the sort that occurred here could have been made when the Fourth Amendment was adopted. However, several of respondents' *amici* dispute the meaning of "breach of the peace." They argue that "breach of the peace" sometimes meant all violations of the criminal law, and thus the restriction on warrantless arrests should be re-written as "no warrantless arrests except for crimes."

This argument fails for several reasons. First, it ignores the general rule at common law that an arrest could not be made without a warrant. *See* 2 *Works of James Wilson* 684 (Robert G. McCloskey ed. 1967) ("A warrant is the first step usually taken for the[] apprehension [of criminals]."); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 641 & n. 256 (1999) (and authorities cited therein). Felonies and ongoing breaches of the peace were an *exception* to this general rule. *See* 2 *Wilson*, *supra*, at 685.

Furthermore, founding-era commentators' writings reflect an understanding that breach of the peace did not encompass all non-felony criminal offenses. *See, e.g.*, 4 William Blackstone, *Commentaries on the Laws of England*, 160-61, 248 (1769); Petr. Br. at 14-15.

Neither respondents nor their *amici* cite framing-era sources that indicate a broader, lesser-known definition of "breach of the peace" was intended when used to describe arrest authority. The authorities they rely upon are a concurring opinion in a case addressing the First rather than the Fourth Amendment,[2] a decision construing the Speech and Debate Clause,[3] and various twentieth-century sources.[4] Neither of the decisions of this Court indicate that "breach of the peace," when used to describe common-law arrest powers, meant any violation of the criminal law.

For example, *amici* Texas and the National League of Cities cite Justice Scalia's discussion of "'peace' and 'order'" in colonial provisions regarding religious observances, *City of Boerne v. Flores*, 521 U.S. 507, 539-40 (1997) (Scalia, J., concurring), as if it were pertinent here. Regardless of any meaning attached to "peace" in that context, the common law authorities on arrest defined breach of the peace far more specifically. *See* Petr. Br. at 13-17. The short 1704 English decision cited by Justice Scalia, 521 U.S. at 539, does not concern the law of arrest. *Queen v. Lane*, 6 Mod. 128, 87 Eng. Rep. 884, 885 (Q.B. 1704), addressed only the technical pleading requirement that an indictment contain the magic words "contra pacem." *Id.*; *see* Petr. Br. at 17 n.8.

Likewise, reliance on decisions construing the Speech

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[2] *City of Boerne v. Flores*, 521 U.S. 507, 538-40 (1997) (Scalia, J., concurring), *cited in* Texas Br. at 17, U.S. Br. at 14 n.12, Nat. League of Cities Br. at 13 n.7.

[3] *United States v. Brewster*, 408 U.S. 501, 521 (1972), *cited in* Texas Br. at 17, U.S. Br. at 14.

[4] *See* Texas Br. at 17; U.S. Br. at 13-14.

and Debate Clause is equally misplaced. First and foremost, that Clause is a wholly unrelated constitutional provision. It shares none of the well-recognized history that led to the adoption of the Fourth Amendment and its accompanying Bill of Rights provisions. *See* Petr. Br. at 8-12.

Moreover, the treatment of "breach of the peace" in the Speech and Debate Clause as applying to "all crimes" involves an historical error. *See Williamson v. United States*, 207 U.S. 425, 439 (1908); *United States v. Brewster*, 408 U.S. 501, 521 (1972). The discussion in *Williamson* was anchored on a quotation attributed to "Blackstone, in 1765," citing "Lewis's ed., *165." That "star" page cite, however, is actually to a later edition, not to the 1765 first edition. In the first edition, Blackstone wrote that arrest of members of parliament was limited to "crimes *of such public malignity* as treason, felony, or breach of the peace; or rather perhaps in such crimes for which surety of the peace may be required," indicating the existence of other crimes that were *not* of such public malignity. 1 William Blackstone, *Commentaries on the Laws of England* 160-61 (1st ed. 1765) (emphasis added). Blackstone also commented that sureties of the peace could be required in cases of "gross misdemeanors." 4 William Blackstone, *Commentaries on the Laws of England* 248 (1st ed. 1769).

Blackstone's initial view – that minor offenses did *not* constitute arrestable breaches of the peace – was the same as that of Chief Justice Pratt, who released John Wilkes on writ of *habeas corpus* in 1763 following his arrest for seditious libel. *See* Petr. Br. 9-10. Pratt released Wilkes after determining that seditious libel was *not* a breach-of-the-peace offense, which meant his arrest had been unlawful because the offense was covered by the privilege held by members of parliament. *Ex Parte Wilkes*, 2 Wils. 150, 19 How. St. Tr. 981, 95 Eng. Rep. (C.P. 1763). Lord Mansfield then sponsored legislation to narrow the privilege, in response to Pratt's freeing of Wilkes.

See Williamson, 207 U.S. at 438-39. Blackstone subsequently amended his discussion of parliamentary privilege to accord with the new statute, and *Williamson* quoted the later revision. But it was Blackstone's original statement, and Pratt's ruling in the *Wilkes* case – part of the very litigation that led to the Fourth Amendment's adoption – that show the common law meaning of "breach of the peace" as understood by the Framers.

B. This Court Has Never Indicated the Limitations on Search and Seizure that Existed When the Fourth Amendment Was Adopted Can Be Legislatively Diluted

In an effort to downplay the significance of framing-era restrictions on arrest, respondents and their *amici* contend there has been a "widespread broadening of authority to arrest," Resp. Br. at 30, and "that a state, by statute, may authorize arrests that would not have been permissible at common law." Texas Br. at 18-19. On the contrary, the framing-era protections against search and seizure are the baseline of Fourth Amendment protections.

1. The Fourth Amendment at times provides greater protection, but never less protection, than when the Amendment was adopted

Respondents correctly note that this Court has stated that "law enforcement practices that existed at the time of the Fourth Amendment's passage" are "not simply frozen into constitutional law." *E.g.*, Resp. Br. at 36. However, the Court has used this statement only in decisions that expanded the Fourth Amendment's protections beyond what existed when the Amendment was adopted. *See, e.g., Payton v. New York*,

445 U.S. 573, 591 n.33 (1980); *Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981); *Tennessee v. Garner*, 471 U.S. 1, 13 (1985). Petitioners are unaware of any instance in which this Court has *weakened* the protections provided by the framing-era common law.

The characterization of *Warden v. Hayden*, 387 U.S. 294 (1967) (*cited in* Resp. Br. at 25; Texas Br. at 16; U.S. Br. at 13), as a case that reduced common law protections, is inaccurate. In *Hayden*, this Court repudiated the "mere evidence rule." *See Hayden*, 387 U.S. at 300-01. *Hayden*, however, was not a reduction of common law protections, but part of a larger shift in the Court's Fourth Amendment jurisprudence that expanded protections by rejecting property and ownership rights as their only bases. *See id.* at 303-07.[5]

As the Court has often explained, the first question in determining whether a particular governmental action violates the Fourth Amendment is whether the action would have been unlawful when the Fourth Amendment was adopted. *See, e.g., Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999). Consistent with such an inquiry, the Court has not indicated that the protections of the Fourth Amendment can be *less* than those that existed when the Amendment was framed.

2. This Court has not approved the legislative dilution of framing-era restrictions on arrest authority

Respondents' broad assertion that the common law may be altered by statute likewise misses the point. Instead, the important inquiry is what legal protections existed at the time

[5] Recent scholarship also indicates that the "mere evidence" rule never was a part of the common law, finding its genesis instead in this Court's decision in *Boyd v. United States*, 116 U.S. 616 (1886). *See* Davies, *supra*, at 726-27, nn. 512, 513.

the Fourth Amendment was adopted. This question helps to determine the meaning of the word "unreasonable," an issue respondents and their *amici* avoid addressing.

Furthermore, Respondents and their *amici* provide no evidence that the framers anticipated that familiar common law restrictions on arrest authority could be lifted by legislation. The only framing-era authorities they cite are those discussing the power of night watchmen to arrest "nightwalkers," derived from the 1285 Statute of Winchester.[6] This "statute," however, was not legislation in the modern sense, but a royal declaration that predated any notion of distinguishing among the executive, legislative, and judicial branches of English government. Indeed, because the statute was so ancient, it was not even distinguished from the rest of the common law. Beyond this, respondents and their *amici* cite no framing-era authorities. In fact, early federal legislation seemed to defer to common law rules of arrest.[7]

The post-framing-era authorities provide no persuasive authority for the understanding when the Fourth Amendment was adopted. For example, the twentieth-century English treatise cited by the Solicitor General cites examples of nineteenth-century English statutes. U.S. Br. at 8-9. This hardly provides any insight into the understanding of the framers of the Fourth Amendment.

Respondents likewise find no support in this Court's decisions to indicate that framing-era restrictions could be abandoned under the Fourth Amendment. Beyond dissenting opinions from individual Justices, respondents and their *amici*

[6] U.S. Br. at 9; Resp. Br. at 31-32. Arguably, the Statute of Winchester just reflected the reasonable notion that, in an age before lighting, finding a person walking about in the dead of night equaled probable suspicion that the person was a felon.

[7] *See, e.g.*, Act of May 2, 1792, ch. 18, § 9, 1 Stat. 265.

only cite cases in which the Court simply did not *mention* the breach of the peace requirement, urging that this silence indicates disapproval of the requirement. *See*, *e.g.*, Resp. Br. at 32-33; Texas Br. at 18. There is a much better explanation for this silence: the rule was not implicated by the decisions.[8]

Petitioners provided extensive authority to demonstrate that Ms. Atwater's arrest would not have been permitted when the Fourth Amendment was framed. *See* Petr. Br. at 7-22. Respondents and their *amici* have offered no persuasive authority to refute this or to indicate that the framers understood that their hard-won protections against search and seizure could be dispensed with by future legislatures.

II. Probable Cause Does Not Insure the Reasonableness of a Custodial Arrest for a Minor Traffic Offense Because It Fails to Balance the Competing Interests of the Individual and Law Enforcement

Respondents broadly assert that "neither more nor less" than probable cause "is required to justify a seizure," Resp. Br. at 11, and even proclaim that probable cause, not reasonableness, is the "touchstone" of Fourth Amendment analysis. Resp. Br. at 4. As the court below did, respondents and their *amici* elevate probable cause so as to render the Fourth Amendment's reasonableness requirement a nullity.

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[8] The arrest held unlawful in *Bad Elk v. United States*, 177 U.S. 529 (1900), involved an offense not committed in the officer's presence. *Kurtz v. Moffitt*, 115 U.S. 487 (1885), dealt with the issue of whether civilian authorities could arrest for desertion from the military, a point the common law did not address. *Carroll v. United States*, 267 U.S. 132, 157 (1925), cited the breach-of-the-peace requirement, and because the common-law rule precluded an arrest, the Court in *Carroll* described the arrest as only an "incidental" arrest after the discovery of a large quantity of illegal liquor.

This Court's jurisprudence supports no such construction. Although in some circumstances, establishing probable cause that an offense has been committed also establishes Fourth Amendment reasonableness, that is not always the case. Because probable cause fails to consider either the nature of the intrusion on the individual or the governmental interests at stake, probable cause alone is insufficient to test the reasonableness of the custodial arrest here.

A. Probable Cause Has Not Replaced Reasonableness as the Touchstone of Fourth Amendment Analysis for Seizures of the Person

This Court has never held that probable cause alone makes a custodial arrest for *any* offense reasonable under the Fourth Amendment. Such a rule ignores the text of the Amendment itself, as well as the Court's decisions in which seizures of the person were at issue.

1. A probable cause requirement for custodial arrests is no requirement at all for most minor traffic offenses

By relying solely on probable cause to justify the arrest of Ms. Atwater, respondents and their *amici* ignore the obvious: probable cause in the traffic offense context imposes no limitation on arrest authority if the officer witnesses the offense. Probable cause imposes no restriction because, by its terms, it presupposes uncertainty regarding the commission of the offense or the location of the object of a search warrant. For example, in *Brinegar v. United States*, 338 U.S. 160 (1949), probable cause imposed a restriction on the stop and search by requiring the Alcohol Tax Unit investigator to identify specific facts and circumstances within his knowledge

that gave rise to his belief that the vehicle's driver was smuggling alcohol. *Id.* at 162-63. In contrast, when a police officer observes a minor traffic offense, there is no uncertainty. The officer witnessed the actual offense.

Respondents and their *amici* therefore actually ask the Court to recognize a rule that permits a custodial arrest for *any offense*, regardless of its nature, committed in an officer's presence. What respondents refer to alternatively as an "objective standard" and a "familiar standard," Resp. Br. at 4, 7, is, in fact, no standard at all for the simple traffic offense.[9] In short, determining whether probable cause exists weighs none of the competing interests at stake; it does nothing to determine whether any legitimate law enforcement interest justifies the extreme intrusion on the individual's liberty interests that results from a custodial arrest.

2. The text of the Fourth Amendment and this Court's decisions show that probable cause does not always equate to reasonableness

Relying solely on probable cause to determine the constitutionality of all arrests also ignores the text of the Fourth Amendment, which places reasonableness above probable cause. First and foremost, the Amendment prohibits *all*

[9] Drunk driving would be an exception. The requirement of probable cause does, in that context, impose an actual limitation, *e.g.*, red eyes, slurred speech, and other possible evidence creating a suspicion of intoxication. But petitioners have never contended that it is unreasonable to arrest based on probable cause for driving while intoxicated, or any other offense that can only be halted by removing the driver from the road. *See* Petr. Br. at 46. Moreover, driving while intoxicated has been widely recognized as an offense that amounts to a breach of the peace.

unreasonable searches and seizures. The Amendment then lists probable cause as one requirement for warrants. Indeed, probable cause was only one part of the common law requirement necessary to support an arrest warrant. *See* Davies, *supra*, at 651-52, 703-06.

This Court's decisions likewise have not indicated that probable cause ends the inquiry of whether a seizure of the person is reasonable. If it did, the thorough discussion in *United States v. Watson*, 423 U.S.411, 414-24 (1976), to determine the reasonableness of a warrantless felony arrest based on probable cause would have been unnecessary.

Texas repeatedly cites *Henry v. United States*, 361 U.S. 98 (1959), to support its contention that probable cause always equates to reasonableness. Texas Br. at 4, 6, 9, 20, 22. But comparing *Henry* with this Court's later decision in *Terry v. Ohio*, 392 U.S. 1 (1968), demonstrates that the constitutional reasonableness of seizures of the person does not always hinge on probable cause.

In *Henry*, this Court invalidated a seizure of the person when probable cause was lacking. The seizure was not a custodial arrest, but an investigative stop of a motor vehicle when the suspicions of federal agents investigating a theft were aroused. The government conceded that an "arrest took place when the federal agents stopped the car." *Henry*, 361 U.S. at 103. "When the officers interrupted the two men and restricted their liberty of movement, the arrest . . . was complete." *Id.* The Court held that the federal agents' suspicions of criminal activity were not sufficient to justify the stop. *Id.* at 104.

Just eight years later, this Court approved a similar seizure of the person. *See Terry v. Ohio*, 392 U.S. 1 (1968). Probable cause again was lacking, and there were "suspicious circumstances" as there had been in *Henry*. *See* 392 U.S. at 5-8. Nevertheless, the Court held it was reasonable for the officer to seize the defendant and pat his person for weapons, based on a reasonable fear that he was armed. *Id.* at 28. This Court has

subsequently approved investigative traffic stops in other settings where probable cause also was lacking. *See, e.g., United States v. Hensley*, 469 U.S. 221, 227 (1985).

This Court also has indicated that sometimes *more* than probable cause that a minor traffic offense has been committed is required to justify a particular seizure of the person. In *United States v. Sharpe*, 470 U.S. 675 (1985), the Court held that a 20-minute roadside detention did not exceed the bounds of *Terry*. *Sharpe*, 470 U.S. at 687-88. The *Sharpe* defendants were driving 55 to 60 miles per hour in a 35 mile-per-hour zone. *Id.* at 677. If probable cause that a traffic violation had been committed were sufficient to justify a custodial arrest, as respondents and their *amici* contend, questioning the *length* of the less intrusive investigative stop would have been pointless. The officers could simply have made a more intrusive custodial arrest for the traffic violation, without developing probable cause for the drug search.

Similarly, the police officer stopped the defendant after observing him driving the wrong way on a one-way street in front of the police station in *Arizona v. Evans*, 514 U.S. 1, 4 (1995). If the officer could have permissibly placed the defendant under custodial arrest for this traffic violation that was committed in his presence, whether the computer correctly indicated there was an outstanding arrest warrant would not have mattered, and there would have been no argument that the exclusionary rule should apply. *See Evans*, 514 U.S. at 10-16.[10]

At times, seizures of the person are permitted on less than probable cause. At other times, more than probable cause has been necessary, as in the context of seizures that begin with

[10] Although *Sharpe* and *Evans* did not address the precise issue in this case, these and similar decisions place in perspective instances identified by Texas where the Court has referred to statutes permitting arrests for traffic violations "without criticism." Texas Br. at 13.

a traffic stop. The common thread throughout these cases has been the Fourth Amendment's express command of reasonableness, and a recognition that all seizures of the person are not alike and have varying degrees of intrusiveness.

The failure to distinguish between different degrees of seizures of the person causes respondents to mistakenly rely on *Whren v. United States*, 517 U.S. 806 (1996). For the *Whren* holding – nothing more than probable cause is needed to justify making a traffic stop – to govern this case, a traffic stop must be indistinguishable from a custodial arrest. At least since *Terry*, however, this Court has treated traffic stops differently from custodial arrests. *See, e.g., Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). Because this case involves a custodial arrest and not a traffic stop, *Whren* does not govern, and the Fifth Circuit majority erred in relying on it.

B. No Legitimate Law Enforcement Interest Was Furthered by the Custodial Arrest in this Case

Because probable cause is an inadequate substitute for reasonableness, the competing interests of the individual citizen and law enforcement must be balanced to determine whether the custodial arrest here was reasonable. Respondents and their *amici* contend that petitioners have not presented the Court with an accurate depiction of the competing interests by minimizing the governmental interest and exaggerating the intrusion. Respondents and their *amici* err, however, by equating arrest with enforcement, by disregarding a crime's penalty as relevant to the scope of arrest authority, and by minimizing the risk, trauma, and intrusion that accompany every custodial arrest.

1. A governmental interest in enforcement of the law does not equal a legitimate governmental interest in making an arrest

Respondents and their *amici* fiercely argue the appropriateness of enforcing seat belt laws, *see*, *e.g.*, Resp. Br. at 12-15, but petitioners do not dispute this point. Enforcement is legitimate and appropriate for all criminal offenses, including seat belt laws. But a custodial arrest is appropriate only if it is "reasonable" after balancing the suspect's interest in being free from such an intrusion and the government's legitimate law enforcement interest (if any) in making the arrest. The government's interest must be evaluated by determining the extent to which the arrest furthers the government's admittedly legitimate interest in enforcing the law *and* by determining the strength of the government's interest in enforcing the law.

Respondents and their *amici* argue that custodial arrests for minor traffic offenses may aid enforcement when drivers are unable to establish their identities. Petitioners accept that in an appropriate case the driver's inability to establish identity may provide a legitimate governmental interest to be considered in the balancing process. The rules proposed by petitioners and *amici*, accordingly, would permit consideration of this factor. But here, identity is not an issue. Respondents concede that "Officer Turek recognized [Ms. Atwater] since he had stopped her 'several months before.'" Resp. Br. at 1. Furthermore, she provided him with her driver's license number, and he was able to confirm she was still a licensed driver. R. 386. The arrest, therefore, cannot be justified by any concerns about her identity or entitlement to drive.

Respondents and their *amici* also seek to justify the arrest here by suggesting that custodial arrests can deter the commission of crime. *See*, *e.g.*, Resp. Br. at 13 & n.8; U.S. Br. at 23. To the extent that assertion is true, it treats arrest as a

form of punishment.[11] However, police officers may not inflict punishment, which is appropriate only after conviction. Thus, the degree to which custodial arrests act as a deterrent is not a legitimate governmental interest that can justify this arrest.

Respondents also challenge petitioners' arguments that quantify the state's interest in enforcing the seat belt law based on its minimal penalty. They argue that the severity of the punishment bears no relation to the means that may be used to enforce the crime. *See* Resp. Br. at 17-18. This Court has stated otherwise. The less serious the violation, the less the intrusion tolerated by the Fourth Amendment. *See Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984); *see also Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

Moreover, the nature and penalty of a criminal offense have always been a consideration in determining the scope of arrest authority. *See* Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 567 (1924) (explaining that the rules of arrest are in part "based upon the nature of the offense"). Common law rules of arrest were based on the reasonable notion that the lighter the punishment, the less likely an accused person would flee, making arrest unnecessary. *See* Edward C. Fisher, *Laws of Arrest* 189 (1967).

Respondents seek to raise the spectre of the dangers of children not using seat belts, but the Texas Legislature provided no greater penalty for unbelted children than for unbelted adults. Both offenses are class C misdemeanors, and the maximum penalty ($50) is less than the typical maximum fine provided for other class C misdemeanors ($500). *Compare* Tex. Transp. Code Ann. § 545.413 *with* Tex. Penal Code Ann. § 12.23. Under this Court's decisions and common law rules

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[11] Petitioners accept the respondents' implicit suggestion that Officer Turek's actions were likely an effort to punish Ms. Atwater. *See also Atwater v. City of Lago Vista*, 195 F.3d 242, 250 (5th Cir. 1999) (en banc) (Wiener, J., dissenting), Pet. App. at 18a.

of arrest, this minor penalty has great significance to the permissible seizures permitted to enforce this crime.

Finally, respondents contend possible enhanced penalties for repeat offenders would make it impossible for an officer who lacks access to a suspect's criminal history to know when a custodial arrest is justified. This argument fails on several grounds. Most fundamentally, respondents again confuse the roles of arrest and punishment. The issue is not whether an officer is entitled to inflict a custodial arrest on a driver who is a repeat offender; the issue remains whether the government has a legitimate law enforcement interest in making an arrest that outweighs the driver's interest in avoiding the intrusion. The government must still show that the arrest furthers the law enforcement function. The fact that a particular offender may be punished more severely by a judge based on a prior record would not change the presumed importance of enforcing the law.

Furthermore, respondents offer no examples, other than drunk driving (which petitioners admit should be treated differently), in which repeat traffic violations dramatically increase the penalties for individual offenses. Thus, even if respondents' objections were valid in the abstract, they do not raise a practical problem that is significant enough to influence this Court when addressing the constitutional problem at issue. In any event, the objections raise no problem here, for Ms. Atwater was not a repeat offender.[12] When Officer Turek stopped her the first time, she and the children were belted in compliance with the law. *See* Petr. Br. at 4.

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[12] Furthermore, Texas law does not provide any enhanced penalty for repeated violations of the seat belt law.

2. Respondents' efforts to minimize the intrusion of Ms. Atwater's custodial arrest fail to make the arrest any more "reasonable"

Respondents claim that "[n]othing unusually harmful to Ms. Atwater is involved here." Resp. Br. at 4-5. Officer Turek "touched" Ms. Atwater for the first time when he handcuffed her, then he "helped her into the back of his patrol car." Resp. Br. at 2. They assert that her vehicle was not "searched," *id.*, presumably because they do not consider the inventory search of her vehicle to be a "search." None of these points make the arrest here any more reasonable or less of an intrusion on Ms. Atwater's liberty interests. Moreover, the fact that Ms. Atwater did not experience some of the more horrible and potentially life-threatening risks that often accompany custodial arrests was merely fortuitous.

The light touch utilized when handcuffing Ms. Atwater does not change its intrusive nature. The arrest occurred in public, in view of a crowd of her neighbors, and in front of her children. *See* Petr. Br. at 3-4. Ms. Atwater also experienced all the usual accouterments of a custodial arrest: handcuffing, transportation to the police station, the booking process, and being placed in a jail cell. *See* Petr. Br. at 4-5. That the arrest was "brief" does not change the fact that for the duration of the arrest, Ms. Atwater's liberty and privacy interests were completely forfeited.[13]

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[13] Respondents might likewise regard the detention of the journeyman printer in the landmark case of *Huckle v. Money* as having been "brief" and not "unusually harmful": the printer was only detained for six hours, and the king's messengers treated Huckle to beefsteaks and beer. *Huckle v. Money*, 2 Wils. K.B. 205, 207, 95 Eng. Rep. 768, 769 (K.B. 1763). Good food and brevity, however, made the arrest no less unlawful. *Id.*

Indeed, if the Lago Vista lockup had been full, Ms. Atwater would have been taken to the Travis County Central Booking Facility, where she would have experienced a far more intrusive and frightening set of booking procedures, and might have spent the night in jail. The Institute on Criminal Justice brief explained how the booking process in most metropolitan jails is especially traumatic for first-time detainees: holding cells with up to 40 potentially violent offenders; possible exposure to infectious diseases such as AIDS and tuberculosis; and increased risks of assault, illness, and even suicide. *See* Inst. Crim. Justice Br. at 6-9.

Finally, arguments that focus on Ms. Atwater's experience after her arrest obscure the real issue: the reasonableness of the arrest itself. This should not depend on the size of the jurisdiction or the procedures used in the jail,[14] but on the officer's decision to place an individual under custodial arrest.

3. Prohibiting custodial arrests for seat belt violations would not handicap legitimate law enforcement interests

Respondents contend that placing any limits on the use of custodial arrests, even for minor traffic offenses, would intolerably handicap legitimate law enforcement, and their actions should not be "second-guess[ed]." *See* Resp. Br. at 23-24. This contention is inaccurate, however, because the good law enforcement practice is to rarely use such arrests. Even the Solicitor General concedes that "it generally is inappropriate to enforce [a seat belt] law other than by way of citation." U.S. Br. at 28. He also reports that the federal agency dedicated to seat

[14] Under respondents' analysis, routine jail procedures, which are generally administered by officials who do not yet know the offense charged, would be constitutionally acceptable for one set of arrestees but not for another.

belt law enforcement considers "arrests for seatbelt violations to be counterproductive to the national goal of increasing seatbelt compliance." *Id.* at 28 n.27. Arresting an individual for any minor offense typically serves no useful purpose, and instead creates more serious problems for law enforcement interests. *See* Inst. Crim. Justice Br. at 11-17.

Of course, exceptional cases may arise in which an arrest for a minor offense will serve some legitimate law enforcement purpose. The possible rule that petitioners propose, *see* Petr. Br. at 45-46, and the possible rules that have been proposed in *amicus* briefs by prominent national organizations, *see, e.g.*, Inst. Crim. Justice Br. at 21-27, all recognize and effectively provide for these exceptional cases. Respondents argue that the model codes demonstrate a need for exceptions to the general practice of issuing citations for traffic offenses. But the need for officer discretion in certain exceptional circumstances does not demand complete, unfettered discretion in *every* circumstance.[15]

Finally, a limiting rule with appropriate exceptions is workable in practice. Some states already apply rules much like those advocated by petitioners and supporting *amici*. *See* Inst. Crim. Justice Br. at 28-29. Many law enforcement agencies (including the Texas Department of Public Safety) already apply such rules as a matter of internal policy. *See id.* at 29-30, Texas Br. at 10-11.

In sum, this Court can safely deal with the Fourth Amendment violation that occurred here without fear of

[15] In any event, respondents' argument goes only to the scope of any rule that might be announced in this case. It does not show why the arrest *in this case*, where none of the cited exceptions apply, was reasonable. "[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances *of each case*." *Cooper v. California*, 386 U.S. 58, 59 (1967) (emphasis added).

handicapping legitimate law enforcement interests. Good police officers already issue citations in lieu of arrest for fine-only traffic offenses, and good law enforcement practice recognizes that arrests for minor offenses are counter-productive. Any rule the Court might adopt could provide appropriate exceptions to deal with exceptional cases. But no exceptional circumstances existed here. The only thing exceptional about this case was Officer Turek's unjustifiable decision to arrest Ms. Atwater.

III. Conclusion.

Respondents have never, at any level of this appeal, even attempted to explain how *this* custodial arrest, the handcuffing and custodial arrest of Gail Atwater, furthered any legitimate law enforcement objective that could not also have been completely accomplished by issuing her a citation. Put another way, no one has ever sought to explain why Officer Turek's use of a custodial arrest under these facts was reasonable.[16] The explanation is simple: the arrest was not reasonable, either in a constitutional sense or in every-day parlance. The judgment of the Fifth Circuit should be reversed.

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[16] Respondents and some *amici* raise Officer Turek's qualified immunity defense. Resp. Br. at 39 n.16; Texas Br. at 22 n.8. The issue is not before the Court. The Fifth Circuit held only that there was no constitutional violation, and refrained from reaching the remainder of the qualified immunity analysis. *Atwater v. City of Lago Vista*, 195 F.3d 242, 246 n.5 (5th Cir. 1999), Pet. App. A. at 7a. Qualified immunity requires first determining the constitutional issue. *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

Respectfully submitted,

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